

Mayu (Migration) [2021] AATA 2301 (21 June 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Alongkot Mayu
CASE NUMBER:	1800675
HOME AFFAIRS REFERENCE(S):	BCC2015/3594226
MEMBER:	Russell Matheson
DATE:	21 June 2021
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl.820.211(c) of Schedule 2 to the Regulations and; • cl.820.221(4) of Schedule 2 to the Regulations.

Statement made on 21 June 2021 at 11:56am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – sponsorship limitation – two previous sponsorships – compelling circumstances affecting the sponsor – first husband left after obtaining permanent residency – second partnership ended due to family violence – documentary and candid and credible oral evidence of long-term relationship – valid marriage and substantial business ties – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), r 1.03, 1.20J, cls 820.211(2)(c), 820.221(4)

CASE

Babicci v MIMIA [2004] FCA 1645; [2005] FCAFC 77

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958*.
2. The applicant is a 40-year-old male national of Thailand. He applied for the visa on 30 November 2015 on the basis of his relationship with his sponsor (Wunnarat Lowpetsawat). At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The primary criteria must be satisfied by at least one applicant. The primary criteria includes cl.820.212(2)(c) which requires the applicant to be sponsored by the sponsor at the time of application, and cl.820.221(4) which requires the sponsorship to continue; to have been approved by the Minister and be still in force.
4. The delegate refused to grant the visa because the sponsor did not satisfy the sponsorship requirements.
5. The applicant appeared before the Tribunal on 29 October 2020 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, Mr Chayat Lowpetsawat, Mr Wiwat Malipa and Mr Austin Day. The Tribunal hearing was conducted with the assistance of an interpreter in the Thai and English languages.
6. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
7. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The Tribunal had before it a copy of the Department's file containing the visa application, sponsorship form, and evidence provided to the Department and Tribunal in relation to the application.
9. The applicant provided the Tribunal a copy of the delegate's decision. The delegate refused the application because it says the sponsor has previously successfully sponsored two de facto partners to Australia and so is ineligible to be a sponsor. The delegate found there were no compelling reasons to waive the sponsorship limitation.
10. The Tribunal received written submissions from the review applicant's representative on 21 October; statements from the applicant, sponsor, the three witnesses (listed above), a marriage certificate showing the parties were married on 30 November 2018, and various business-related documents and documents demonstrating the parties' relationship.
11. The applicant and sponsor gave their oral evidence separately. The parties gave evidence about the formation of their relationship, their knowledge of each other's family background and relationship histories, finances, assets, business arrangements, friends, and household

arrangements. The Tribunal found their evidence and the three witnesses to be candid and credible. The Tribunal accepts their oral evidence on that basis. The Tribunal has considered their oral evidence together with the documentary evidence to reach the findings below.

12. The delegate has not made an assessment of the evidence in respect of the requirement that the applicant is required to be the spouse or de facto partner of the sponsor. Having regard to the *President's Direction - Conducting Migration and Refugee Reviews* the Tribunal will restrict its review to the matters decided by the delegate.
13. The issue in the present case is whether the sponsorship of the applicant's visa should be approved because there are compelling reasons affecting the sponsor.

Is the applicant sponsored?

14. Clause 820.211 requires at the time of application; the applicant meets one of several alternative sub criteria. These include 820.211 (2)(c) which requires that the applicant was, at the time of application, sponsored by the sponsor, where such person has turned 18; or where they have not, by the sponsor's parent or guardian who has turned 18 and is either an Australian citizen, permanent resident or eligible New Zealand citizen (as defined in r.1.03 of the Regulations).
15. A copy of the applicant's passport is on the Department's file. The Tribunal finds the applicant has turned 18. A copy of the sponsor's passport is on the Department's file. The Tribunal finds the sponsor is an Australian citizen.
16. The Department's file contains the sponsorship Form 40SP lodged with the application and signed by the sponsor. The Tribunal finds that she completed the requisite sponsorship form and the applicant was, at the time of application, sponsored by the sponsor.
17. Therefore, the time of application sponsorship requirement, cl.820.211(2)(c), is met.

18. Should the sponsorship be approved?

19. At the time of the decision, cl.820.221(4) requires that the sponsorship mentioned in cl.820.211(2)(c) continues and has been approved by the Minister and is still in force.
20. Sponsorship approval is subject to limitations contained in r.1.20J of the Regulations which sets a limit on the number of people that a person can sponsor in a lifetime and a minimum time that must lapse between each sponsorship, and in r.1.20KA which sets a limit on the period before which certain Parent visa holders can sponsor another person for a Partner visa. There are further limits imposed by r.1.20KB in relation to sponsors charged with, or convicted of, certain offences where the visa application was made on or after 27 March 2010, and r.1.20KC for sponsors convicted of a relevant offence who have a significant criminal record in relation to the relevant offence where the visa application was made on or after 18 November 2016.
21. Relevantly, r.1.20J of the Regulations sets a limit on the number of people that a person can sponsor in a lifetime and a minimum time that must lapse between each sponsorship. Under r.1.20J(1), a sponsor is limited to a total of two approved sponsorships or nominations that lead to the grant of a partner visa (or entry permit) or a visa (or entry permit) granted on the basis of the domestic violence provisions. If there has been one previous sponsorship or nomination, or if the sponsor was granted a visa or entry permit as a result of *being* sponsored, a period of five years must have passed since the date of the earlier visa application. These requirements apply unless the Minister, or the Tribunal on review, is satisfied there are compelling circumstances affecting the sponsor: r.1.20J(2).

22. The delegate says the present case is affected by the sponsorship limitation in r.1.20J because it is the sponsor's third sponsorship. Departmental records confirm the sponsor has sponsored two previous spousal/de facto partners; the first sponsorship was in support of Mr V's partner visa application, which commenced on 4 December 2003 and resulted in the grant of a permanent visa. Subsequent to this, the sponsor also sponsored her second partner, Mr D, which commenced on 29 June 2009 which also resulted in the grant of a permanent visa.
23. The Tribunal finds the sponsor has held two previously approved sponsorships that each led to the grant of a Partner visa. She has made a third application regarding sponsorship of the applicant with whom she commenced a de facto relationship in August 2013 and married the applicant on 30 November 2018 at the Registry of Births, Deaths and Marriages, Sydney. The sponsor's sponsorship of the applicant must not be approved unless there are compelling circumstances affecting her.
24. As acknowledged by the parties at the hearing, the sponsor has previously had two sponsorships or nominations.
25. The Tribunal considered if the sponsorship should be approved because of compelling circumstances affecting the sponsor. The sponsor provided evidence that her first marriage to Mr V took place over 15 years ago and her husband left her after obtaining his permanent residency in Australia and returned to Thailand. She further states that she divorced him in 2003. The sponsor stated that she then commenced a second de facto relationship with Mr D in 2008 which ended in 2013 due to family violence. She further states that since the failure of her two previous relationships she has had mental distress and experienced a high level of anxiety and depression.
26. The Tribunal accessed the Department's records (ICSE) to confirm the outcomes of the sponsor's previous sponsorships. The Department's records confirm the sponsor's two previous sponsorships were approved and both sponsored Partner visa applications were granted which also resulted in the grant of permanent visas.
27. The Tribunal finds the sponsor has held two previously approved sponsorships that each led to the grant of a Partner visa. She has made a third application regarding sponsorship of the applicant with whom she commenced a de facto relationship in August 2013. The sponsor's sponsorship of the applicant must not be approved unless there are compelling circumstances affecting her.
28. The Tribunal considered if the sponsorship should be approved because of compelling circumstances affecting the sponsor.
29. The expression 'compelling circumstances' is not defined in the legislation. The Tribunal must consider whether the circumstances are such that they evoke interest or attention in a powerfully irresistible way: *Babici v MIMIA* [2004] FCA 1645 or are 'so powerful that they lead the [Tribunal] to make a positive finding that the [provision] should be waived': *Babici v MIMIA* [2005] FCAFC 77.
30. The parties provided the following documents to be considered by the Tribunal when considering compelling circumstances affecting the sponsor that include but are not limited to:
 - A Statutory Declaration from the sponsor (dated 16 October 2020);
 - A Statutory Declaration from the applicant (dated 16 October 2020);

- A Statutory Declaration from the applicant (dated 30 November 2015);
 - A Statutory Declaration from Mr Chayat Lowpetsawat (dated 20 October 2020);
 - A Statutory Declaration from Mr Wiwat Malipa (dated 21 October 2020);
 - A Statutory Declaration from Mr Austin Day (dated 21 October 2020);
 - A Marriage Certificate for the Applicant and Sponsor (dated 30 November 2018);
 - Photographic evidence of the relationship between the applicant and the sponsor (including captions) from 2014-2020;
 - Joint travel itinerary for the applicant and the sponsor since 2017;
 - Joint bank statements from CBA for the applicant and the sponsor from 2018 until the present;
 - ASIC search for Satang Infinity Corporation Pty Ltd;
 - ASIC search for Satang Original Pty Ltd;
 - Satang Original (V-Bar) Catering Equipment (Licence to occupy World Square Premises);
 - Bank Statements for Satang Infinity Pty Corporation Pty Ltd.
31. The parties gave evidence about the formation of their relationship, their knowledge of each other's family background and relationship histories, finances, assets, business arrangements, friends, and household arrangements and love for each other. The Tribunal accepts that the parties are legally married and have been in a long-term relationship for over seven years.
32. The Tribunal accepts that the parties have provided a reasonable amount of evidence to the Tribunal and Department that includes, but is not limited to, the following, indicating that the applicant and sponsor were in a genuine spousal/de facto relationship at the time of application and decision. The applicant provided documentary evidence of the financial aspects such as: joint bank statement's, joint business statement's and the sharing of day-to-day household expenses and payment of utility bills in joint names, joint car insurance, tax returns and they have made each other the beneficiary of their superannuation funds. They have provided copies of ASIC searches that indicate the parties are joint business owners. She also provided captioned photographic evidence of the parties' wedding, social activities in numerous settings, and travel together in Thailand and Australia. They have provided statutory declarations from family and friends attesting to the parties' relationship and that they represented themselves as being in a spousal/de-facto relationship. Additionally, the applicant has provided documentary evidence and correspondence addressed jointly and individually to the parties indicating that they had established a joint household and are living together. The parties provided evidence of their commitment to the relationship and a strong degree of companionship and emotional support and a belief that their relationship was long-term.
33. The parties in their statements and written submission through their authorised representative claim to have been in a genuine and continuing relationship that is healthy and stable. The Statutory Declarations from the sponsor, applicant and witnesses demonstrate that it is evident the sponsor depends heavily on the applicant for both her

mental and physical wellbeing and assistance with her business interests. Furthermore, the nature of the detriment should the applicant be required to depart Australia will be both emotional and financial to the parties if the applicant returned to Thailand resulting in the closure of their businesses and the significant loss of jobs. The applicant also stated that it would be impossible for the parties to re-establish themselves in Thailand due to the devastating impacts across the tourism and hospitality industries due to the COVID-19 pandemic. The Tribunal found the applicant, sponsor, and three witnesses to be candid, credible and their evidence detailed and convincing. The parties gave evidence of having provided evidence of substantial business ties to Australia that is evidenced through the company documents submitted that relates to the sponsor's restaurant business in World Square, Sydney.

34. Based on the evidence provided, the Tribunal accepts that the sponsor relies on the applicant for both her physical and mental wellbeing and assistance with her business interests and the sponsor would suffer significant financial hardship with the closure of her business interests. The Tribunal finds that it is reasonable to consider that she would not be able to re-establish her business interests in Thailand due to the impact of COVID-19. The Tribunal has considered if the circumstances surrounding the parties' relationship gave rise to compelling circumstances affecting the sponsor. For the purposes of this decision only, the Tribunal accepts the parties have been in a committed relationship with each other for over seven years, since August 2013 and the new relationship is a long-term partner relationship. This finding is supported by significant documentary evidence and the marriage certificate. The Tribunal finds when considered individually and holistically this provides compelling circumstances affecting the sponsor such that the sponsorship should be approved.
35. The Tribunal is satisfied the circumstances affecting the sponsor are, when considered jointly, compelling circumstances so as to approve the sponsorship.
36. The sponsors signed and dated sponsorship form acknowledges she consents for the Department to disclose to the visa applicant any conviction for relevant offences. There is nothing before the Tribunal to suggest the sponsorship is no longer in force.
37. The Tribunal is satisfied that there is no information before it that suggests that the sponsorship limitations of r.1.20K, r.1.20KA or r.1.20KB prevent approval.
38. Having regard to all of the circumstances the Tribunal is satisfied there are compelling circumstances affecting the sponsor, and the sponsorship can be approved despite the operation of r.1.20J(1).
39. On the evidence before the Tribunal, the requirements of cl.820.211(2)(c) and cl.820.221(4) are met.
40. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.
- 41.
- 42.
- 43.

DECISION

44. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211(2)(c) of Schedule 2 to the Regulations; and
- cl.820.221(4) of Schedule 2 to the Regulations.

45. Russell Matheson
Member